

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Surgicore Of Jersey City, LLC
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1296-2536

Applicant's File No. SS-244065

Insurer's Claim File No. 214538347

NAIC No. 24260

ARBITRATION AWARD

I, Marianne C. Zack, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: EIP

1. Hearing(s) held on 12/15/2023
Declared closed by the arbitrator on 12/15/2023

Greg Intingen from Samandarov & Associates, P.C. participated virtually for the Applicant

Jean Schabuttl from Progressive Casualty Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$976.38**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to the 4/21/2023 date of commencement of this arbitration.

3. Summary of Issues in Dispute

Assignor ("EIP") was injured in a motor vehicle accident that occurred on 11/5/2021. Following the accident, EIP suffered injuries which resulted in medical treatment. In dispute is an invoice in the amount of \$976.38 for a facility fee incurred in connection

with lumbar epidural steroid injections performed on 1/13/2023. Respondent denied reimbursement of the invoices based on lack of medical necessity, relying on the IME report of Dr. Anna Krol dated 8/16/2022.

4. Findings, Conclusions, and Basis Therefor

The hearing in this matter was conducted without any witnesses. This award is based upon hearing the oral arguments of representatives of both parties and upon a full review of the documents contained in the electronic case file as of the date of the Award.

Denial Language:

At the outset of the hearing Applicant's counsel argued that the denial language was not specific enough to identify the IME upon which Respondent relied upon to deny the claims at issue. I do not agree.

"Although an insurer may disclaim coverage for a valid reason (Insurance Law, s 167, subd. 8) the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully. This uncertainty could prejudice the claimant's ability to ultimately obtain recovery. In addition, the insure[r]'s responsibility to furnish notice of the specific ground on which the disclaimer is based is not unduly burdensome, the insurer being highly experienced and sophisticated in such matters." *General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512, 514 (1979).

Respondent's denials state that "[b]ased upon the results of a Medical Examination, these services are denied."

The denial language is adequate and not fatal to Respondent's denial, as it apprises Applicant of the fact that the Respondent is relying on a medical examination which determined that the treatment was not medically necessary. I find that the grounds for disclaimer as set forth in the denial was sufficient for Applicant to assess whether Respondent will be able to disclaim successfully.

Lack of Medical Necessity:

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's

treatment. See, *Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). An insurance carrier may utilize an independent medical examination (IME) to determine whether an eligible injured person is entitled to further care and treatment or other first-party benefits. See *Rowe v. Wahnow*, 26 Misc.3d 8, 11-12 (App Term, 1st Dept 2009, McKeon, P.J., dissenting).

"An IME is a snapshot of the injured party's medical condition as of the date" it is conducted. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010). An IME report can be the basis of a termination of benefits if ultimately found to be persuasive. An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. *Ying Eastern Acupuncture, P.C. v. Global Liberty Ins.*, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008).

The determination that an eligible injured person no longer needs treatment is generally based upon an examiner's findings that result in the conclusion that: (1) the patient has fully recovered from the injuries; (2) the patient has made as full a recovery as is possible taking into account the nature and extent of the injuries, the patient's age, pre-existing conditions or other factors; and/or (3) additional treatment or testing will not provide any medical benefit to the patient. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010).

Whether an IME report is persuasive and meets the carrier's burden is a factual decision, which must be rendered on a case by case basis. If the IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, the burden shifts back to the Applicant to refute the IME findings and prove the necessity of the disputed services. See, *CPT Med. Servs., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc.3d 87 (App. Term 1st Dept.). If the Applicant fails to present any evidence to refute Respondent's showing, the claim should be denied, as the ultimate burden of proof on the issue of medical necessity lies with the Applicant. See Insurance Law § 5102; *Wagner v. Baird*, 208 A.D.2d 1087 (3d Dept. 1994).

The case law is clear that a provider must rebut the conclusions and determinations of the IME doctor with his own facts. As the Appellate Term, 2d, 11th & 13th Dists., stated: "it is ultimately plaintiff who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary." *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19, 22 (App. Term 2d, 11th & 13th Dists. 2012).

On 8/16/2022, at the request of Respondent, EIP attended an IME with Dr. Krol. At the IME, EIP complained of continuous pain in the neck, lower back, right shoulder, right

wrist and on and off pain in the neck, low back and right knee. EIP complained of numbness and tingling in her left forearm and fingers. EIP stated that she receives physical therapy, chiropractic treatment and acupuncture at a frequency of three times a week. EIP reported that treatment has been helpful.

After conducting a physical examination, Dr. Krol concludes that EIP suffered sprain/strain injuries to the lumbar spine which is resolved. Dr. Krol states that the EIP suffered a contusion to the right shoulder and recommended further treatment to the shoulder. Dr. Krol concludes that based on her examination of the EIP, the EIP has not reached maximum medical improvement. She then concludes that there is no need for injections.

Respondent has not satisfied its burden of establishing lack of medical necessity for the treatment at issue. The IME has inconsistencies. Dr. Krol states the EIP has not reached maximum medical improvement and then states that there is no need for further treatment.

Award in favor of Applicant.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**
- The policy was not in force on the date of the accident
 - The applicant was excluded under policy conditions or exclusions
 - The applicant violated policy conditions, resulting in exclusion from coverage
 - The applicant was not an "eligible injured person"
 - The conditions for MVAIC eligibility were not met
 - The injured person was not a "qualified person" (under the MVAIC)
 - The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
 - The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Surgicore Of Jersey City, LLC	01/13/23 - 01/13/23	\$976.38	Awarded: \$976.38
Total			\$976.38	Awarded: \$976.38

B. The insurer shall also compute and pay the applicant interest set forth below. 04/21/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.* However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY
SS :
County of Erie

I, Marianne C. Zack, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/22/2023
(Dated)

Marianne C. Zack

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form
Unique Modria Document ID:
69ed41c708f2c99ee1660b5a02455ff9

Electronically Signed

Your name: Marianne C. Zack
Signed on: 12/22/2023